Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID C. SINGLETON,

Petitioner,

vs.

DON CECIL, HARLEY MOYER, IVAN PARKER, KEVIN TIDWELL, DELLA PRICE, and CITY OF ADVANCE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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August, 1999

QUESTION PRESENTED

Does the discharge of a police officer by city officials deny him the right to substantive due process where the decision was based solely on the fact that his wife made a remark about the chief of police during a private conversation with her daughter?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner David C. Singleton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on April 27, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit on rehearing *en banc* is reported at 176 F. 3d 419 and is reprinted in the appendix at p. 1a, *infra*. The panel opinion on rehearing is reported at 155 F. 3d 983 and is reprinted in the appendix at 28a, *infra*. The initial panel opinion is reported at 133 F. 3d 631 and is reproduced in the appendix at 46a, *infra*. The memorandum and order of the United States District Court for the Eastern District of Missouri has not been reported and is reprinted in the appendix hereto at 56a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 27, 1999. On July 19, 1999, Justice Thomas ordered that the time for filing this petition for writ of certiorari be extended to and including August 31, 1999. The jurisdiction of this Court's is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment, to the Constitution of the United States provides in relevant part:

> SECTION 1. . . . No State shall make or enforce any law which shall abridge the privilege or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

David C. Singleton brought the present action pursuant to 42 U.S.C. §1983 alleging that he was discharged from his employment with the City of Advance, Missouri in violation of his First and Fourteenth Amendment Rights. Jurisdiction was premised on 28 U.S.C. §1331 and §1334(3) and (4).

Petitioner was employed as a police officer for the City of Advance from 1990 until his termination in March 1994. He did not have a written employment contract and was an employee at-will under Missouri law. The respondents, Harley Moyer, Ivan Parker, Kevin Tidwell, and Della Price were members of the city council for the City of Advance. Respondent Don Cecil was the city's chief of police.

Singleton's wife routinely called to talk to their daughter, Sabrina Scaggs, each morning. On March 8, 1994, Joann called her daughter who happened to be using a cordless telephone. She mentioned a rumor she had heard at work about the chief of police taking bribes. When her daughter asked what could be done about it, her mother stated: "The only thing we can do about it is set him up. We can have somebody drive through and show out and make him a bribe." (Appendix to Brief of Appellant, before the Eighth Circuit, pages 84-85, lines 24-25/7-12; pages 85-86, lines 24-25/1-5). The implication was that if he accepted a bribe for fixing a ticket, he could be removed from office or prosecuted. No further mention was made of the matter during the conversation and no action was ever taken by Joann or Sabrina in that regard.

Unknown to Joann and Sabrina, the conversation was recorded by a local private investigator who had been scanning cordless telephone radio frequencies in the city. He gave the tape recording to Chief of Police Cecil who met individually with each member of the city council and played the tape. He also identified Joann's voice as that of Singleton's wife. No reason was given or publicly divulged for the action. At a special meeting held on March 11, 1994, the council voted to terminate Singleton's employment with the city. During the course of litigation, respondents submitted affidavits signed by each council member stating that the decision to discharge Singleton was based on Joann's taped statement about setting-up the chief "and nothing else." (Appendix to Brief of Appellant, page 53, paragraph 27; page 58, paragraph 27; page 63, paragraph 24; page 68, paragraph 27).

Singleton filed suit against the city and respondents alleging denial of his First and Fourteenth Amendment rights to due process of law. During the course of litigation he learned that the sole reason for his discharge had been his wife's tape recorded remark about the chief and not any claimed fault on his part. He amended his complaint to allege those facts. He asserted discharge from employment was intended to vicariously punish him in retaliation for his wife's exercise of her right of free speech, and his family association with his wife and daughter. He also alleged that his discharge under the circumstances deprived him of his right to due process of law under the Fourteenth Amendment. Respondents filed a motion for summary judgment supported by the affidavits in which they stated that they fired Singleton solely because of his wife's statement about setting-up the chief. The District Court held that the evidence showed that respondents had a "legitimate, good faith belief that plaintiff, with his family was engaging in improper conduct by conspiring to bribe the chief of police." It granted the motion and dismissed the action.

Singleton appealed to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. He argued that discharging him solely in retaliation for his wife's remark was so patently arbitrary and irrational as to constitute a denial of substantive due process. He further argued that he was being punished on the basis of guilt by association. The panel initially held that he was an at-will employee and that his discharge was not based on constitutionally impermissible grounds, such as retaliation for exercising rights guaranteed by the constitution. It further held that the discharge did not directly and substantially implicate his right to marriage and family association. In a short dissent, Chief Judge Richard S. Arnold observed that in our legal traditions, the concept of fault is individual and one person is not punished for what another does, including a husband and wife. He likewise pointed out that the factual support for the District Court's conclusion was utterly lacking. He asked, "But what is the evidence for this statement (aside from the bare fact of the marital relationship)? The District Court cites none, this Court cites none, and I know of none." On rehearing of the case, the panel reversed in favor of Singleton. In a well-reasoned opinion, Judge Arnold, writing for the court, held that on the basis of the facts submitted by respondents, that Singleton was terminated simply because of a conversation between his wife and daughter and nothing else. Those facts he concluded were wholly arbitrary and irrational and deprived Singleton of the substantive due process protection of the Fourteenth Amendment. (*See* Appendix pp. 30a-40a).

Thereafter, the Eighth Circuit granted rehearing *en banc* and reversed. It held that since Singleton was an employee at-will under Missouri law, his firing because of the conversation between his wife and daughter did not violate his substantive due process rights even if it were arbitrary and capricious. It reasoned that the absence of a "property" or "liberty interest" that would support a procedural due process claim, was fatal to Singleton's substantive due process claim.

Judge Arnold, in a terse, forceful and admirably lucid dissent, joined by two other members of the court, stated that aside from reliance on fundamental rights and express constitutional protections, the right to substantive due process may be established by government actions which are truly arbitrary or which shock the conscience or offend judicial notions of fairness or human dignity. In this respect he adopted his analysis in the second panel opinion in which he concluded respondents' action was "wholly arbitrary." *See* 155 F. 3d 983 (8th Cir. 1998), also reprinted in the appendix, pp. 28a-40a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT AND UNRESOLVED PROBLEMS FOR DUE PROCESS ANALYSIS AND IS INCOMPATIBLE WITH AMERICAN SOCIAL, POLITICAL AND LEGAL TRADITIONS AND PRINCIPLES

The Eighth Circuit Court of Appeals in its decision held that David Singleton was not entitled to the protections of substantive due process despite the fact that he was discharged from employment not for any fault on his part but solely on the basis of his wife's statement to their daughter. It concluded that he was an employee at-will without a liberty or property interest in his job and could therefore be terminated for any reason even if those reasons were arbitrary and capricious.

The decision concluded that arbitrariness and conscience-shocking were separate and distinct standards for due process analysis. The Court stated that there is no general liberty interest in being free from arbitrary and capricious government action. It recognized that substantive due process does not require a plaintiff to prove a violation of a specific liberty or property interest provided that the conduct in question be such

that it "shocks the conscience." However, the standard for due process analysis is not so narrow. In *County of Sacramento v. Lewis*, __ U.S. __, 140 L. Ed. 2d 1045 (1998), the Court stated:

> Most recently in *Collins v. Harker Heights* . . . we said again that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." 140 L. Ed. 2d 1058.

Judge Richard S. Arnold in his dissent joined by two other members of the court makes a compelling case that the terms "arbitrary" or "conscience shocking" are not separate standards but only ways of restating the same thing using slightly different formulations. An action which is arbitrary in the constitutional sense, and which therefore violates the Due Process Clause is something that shocks the conscience or offends judicial notions of fairness or human dignity. The question simply put is whether the conduct of the respondents in discharging Singleton violated those basic principles of liberty and justice which lie at the foundation of our social and political institution. What does the evidence in the record establish? First Singleton was terminated by the city not for anything he had done or any involvement on his part but solely on the basis of his wife's statement "and nothing else." The defendants offered no other explanation. Under those circumstances their action was one of retaliation against the wife by firing the husband. In our society and legal tradition, guilt is individual. We do not punish one person for what another does, let alone says. The principle extends to husbands and wives as well. (*See* Judge Arnold's analysis, pp. 33a-34a).

Moreover, the wife's statement privately made during a telephone conversation with her daughter was plainly protected speech. The wife's protected speech was used to exact

retribution by terminating her husband. It is inconceivable how the constitution can countenance punitive measures directed not at the individual exercising the right, but at her husband based on nothing more than marriage. Such conduct vicariously penalizes the wife for exercising her rights and causes the husband to suffer when he has committed no wrong. It is, if anything, considerably more invidious and difficult to counteract than direct reprisal. The decision will have a chilling effect on potentially hundreds of thousands of public employees and their families across the country who serve at the will of their employers. The opinion would require every husband to muzzle his wife and to keep and regulate her expressions, associations and speech or face the likelihood of being discharged for something she might say. Such restriction on spousal rights are completely at odds with contemporary social values. The days are long since passed when a woman is forced to live in her husband's shadow or speak only when spoken to or with his consent.

The opinion of the Eighth Circuit is inconsistent with developing law in other circuits which have recognized substantive due process claims based on spousal retaliation. Those cases by and large recognize that one may have a substantive due process claim for discharge due to retaliation for his wife's exercise of her First Amendment rights on the theory that they may burden fundamental rights involving marriage. See: *Montgomery v. Carr*, 101 F. 3d 1117 (6th Cir. 1996); *Adkins v. Board of Education of Magoffin County, Ky.*, 982 F.2d 952 (6th Cir. 1993); and *Morfin v. Albuquerque Public Schools*, 906 F. 2d 1434 (10th Cir. 1990).

The Eighth Circuit's opinion is an anomaly and creates a confusing and disturbing precedent with far-ranging consequences and is likely to generate even further confusion among other circuits unless certiorari is promptly granted. Justice Arnold's analysis referred to throughout this petition

provides a scholarly and exceptionally lucid analysis of the applicable law and facts. Petitioner accordingly refers the Court to his discussion in the appendix at pp. 20a-27a and 28a-40a.

CONCLUSION

For the reasons set forth herein, this petition for writ of certiorari should be granted and the judgment of the Court of Appeals for the Eighth Circuit be reversed and remanded for determination of damages.

Respectfully submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 97-1726

David C. Singleton,	*	
	*	
Appellant,	*	
	*	Appeal from the
	*	United States District
v.	*	Court for the Eastern
	*	District of Missouri.
Don Cecil, Individually and in his official capacity as Chief of Police; Harley Moyer; Ivan Parker; Kevin Tidwell; Della Price; City of Advance,	*	
Appellees.	*	

Submitted: January 11, 1999
Filed: April 27, 1999

Before BOWMAN, Chief Judge, MCMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, En Banc.

MAGILL, Circuit Judge.

Following the analysis of our sister circuits and Supreme Court precedent, we affirm the district court's[1] holding that, in Missouri, an at-will employment state, a discharged municipal

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[1]The Hon[illegible]
District

at-will employee does not have a section 1983 substantive due process occupational liberty interest under the Fourteenth Amendment.

I.

A. Facts

David Singleton worked for the City of Advance, Missouri as a police officer from 1990 until his termination in 1994. The City of Advance did not have a written employment agreement with Officer Singleton. Officer Singleton's employment was terminable at will, either by the mayor with approval of a simple majority of the city council, or by a two-thirds vote of the city council. See Mo. Ann. Stat. §79.240 (1998); State ex rel. Lupo v. City of Wentzville, 886 S.W.2d 727, 730-31 (Mo. Ct. App. 1994). Neither state nor local law limited the reasons for which Officer Singleton could be discharged nor afforded him the right to a hearing in connection with his discharge. At the time of Officer Singleton's discharge, defendant Don Cecil was Advance's police chief, and defendants Harley Moyer, Ivan Parker, Kevin Tidwell, and Della Price were members of Advance's city council. William Bradshaw, the mayor of Advance, was not a named defendant.

During the period of his employment, Officer Singleton became concerned that Chief Cecil had abused an incentive program designed to facilitate government purchases by purchasing a car for his own benefit and use under the program.[2] Despite his belief that Chief Cecil had engaged in illegal activity, Officer Singleton never notified any law enforcement officials, the mayor, or the city council of his concern. On the morning of March 8, 1994, Officer Singleton's wife, Joann, called their daughter, Sabrina, on a cordless

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[2]In fact, Mayor Bradshaw and the city council members had prior knowledge of the vehicle purchase and considered the car available for use by the city as a backup police vehicle.

telephone. During the conversation, they began discussing Chief Cecil, and Joann said she wanted to "set up" Chief Cecil by hiring someone to bribe him. Unbeknownst to Joann and Sabrina, this statement was recorded by David George, a local private investigator who happened to be scanning radio frequencies at the time.[3] Later that day, George contacted Chief Cecil and Mayor Bradshaw and played the recorded conversation for them. George also gave Chief Cecil a copy of the recording. Chief Cecil then visited the members of the city council and played the recording for them individually. Each council member recognized Joann's and Sabrina's voices on the recording and, at a special meeting on March 11, 1994, they unanimously voted to terminate Officer Singleton's employment. They did not include a reason for discharging Officer Singleton in his termination letter. Nor did they publicly divulge any reason for the discharge.

Officer Singleton then initiated this suit under 42 U.S.C. §1983 against Chief Cecil, the four council members, and the City of Advance. He alleged that his termination by the defendants violated his rights of free speech, due process, intimate association, and privacy. His free speech allegation rested on the premise that he was discharged in an effort to keep him silent concerning Chief Cecil's car purchase. In response, the council members divulged that they based the termination decision solely on Joann's plot to bribe Chief Cecil. The district court granted summary judgment in favor of the defendants on all of Officer Singleton's claims. Particularly, the district court concluded that Officer Singleton could not prevail on his free speech claim because he could not demonstrate any causal connection between Chief Cecil's car purchase and his

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[3]There is no contention on appeal that this interception was illegal or that George was targeting conversations between Joann and Sabrina. George testified that throughout March 1994, he monitored cordless phone channels in the City of Advance with his radio scanner "more or less" for entertainment purposes. Appellee's App. at 228.

termination. See Singleton v. Cecil, 955 F. Supp. 1164, 1166-1167 (E.D. Mo. 1997). The district court also found that Officer Singleton could prevail on any procedural due process claims because, as an at-will employee, he had no liberty or property interest in his job. See id. at 1167. Finally, the district court held that Officer Singleton's claims that he was deprived of his rights of intimate association and marital privacy failed because "the defendants had a legitimate, good faith belief that plaintiff, with his family, was engaging in improper conduct by conspiring to bribe the Chief of Police." Id.

B. Missouri At-Will Employment Law

Because the "Due Process Clause does not purport to supplant traditional tort law," Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (quotations omitted), and because property interests protected by the Due Process Clause are not created by the Constitution, but rather by independent sources such as state law, municipal ordinance, or contract, see Bishop v. Wood, 426 U.S. 341, 344 & n.7 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-78 (1972); Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 718 & n.3 (8th Cir. 1995), we briefly set forth the pertinent Missouri law on at-will employment. In this case, neither state law, municipal law, a collective bargaining agreement, or an employment contract afforded Officer Singleton any property interest in his job. In contrast, as an at-will employee in Missouri, he could be discharged "for cause or without cause." Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985). Indeed, he could even be discharged "for no reason or for an arbitrary or irrational reason." Shawcross v. Pyro Prods., Inc., 916 S.W.2d 342, 343 (Mo. Ct. App. 1995) (quotations omitted).

Notwithstanding the broad grant to employers of the power to fire at-will employees for any or no reason, Missouri law affords a discharged at-will employee such as Officer Singleton

the ability to seek judicial redress. Such an employee may assert a cause of action for tortious interference with employment against third-parties, i.e., non-employers such as George, for inducing the discharge. See Stanfield v. National Elec. Contractors Ass'n, Inc., 588 S.W.2d 199, 202 (Mo. Ct. App. 1979); see also Haddle v. Garrison, 119 S. Ct. 489, 492 (1998) (explaining the "third party interference with at-will employment relationships . . . has long been a compensable injury under tort law"). He also may bring tortious interference claim against his direct supervisor and employer if he presents "evidence eliminating any business justification at all for the termination." Eggleston v. Phillips, 838 S.W.2d 80, 83 (Mo. Ct. App. 1992). In addition, and despite the typical prohibition against bringing wrongful discharge claims, such an employee may allege that his discharge violated Missouri public policy. See Shawcross, 916 S.W.2d at 343. Officer Singleton has not attempted to assert any state law claims in this case.

II.

On appeal, a divided panel of this court originally affirmed the district court in all respects. See Singleton v. Cecil, 133 F.3d 631, 635 (8th Cir.), vacated, 133 F.3d 631, 636 (8th Cir. 1998) (Singleton I). After granting Officer Singleton's petition for rehearing, the panel, with one judge dissenting, affirmed most of the district court's grant of summary judgment, but reversed on the sole ground that it believed the defendants deprived Officer Singleton of his occupational liberty, which was ostensibly protected by substantive due process. See Singleton v. Cecil, 155 F.3d 983, 986-90 (8th Cir.), vacated, 155 F.3d 983, 992 (8th Cir. 1998) (Singleton II).

In the course of reversing the district court, the panel majority conceded that Officer Singleton was not deprived of any life, liberty, or property interest that would support a procedural due process claim. See id. at 987, 989. Under Eighth Circuit law, this concession should have precluded

Officer Singleton from proceeding on a substantive due process theory. See Weimer v. Amen, 870 F.2d 1400, 1405-06 (8th Cir. 1989) ("to the extent our cases recognize a constitutional right to substantive due process, that right is no greater than the right to procedural due process"); Buhr v. Buffalo Pub. Sch. Dist. No. 38, 509 F.2d 1196, 1202 (8th Cir. 1974); accord Clark v. Whiting, 607 F.2d 634, 641-42 n.17 (4th Cir. 1979) (absence of a liberty or property interest in connection with a procedural due process claim is fatal to the plaintiff's purported substantive due process claim); Weathers v. West Yuma County Sch. Dist. R-J-1, 530 F.2d 1335, 1340-42 (10th Cir. 1976) (same); Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 4 (7th Cir. 1974) (Stevens, J.) (same).

Nevertheless, the panel majority elected not to follow this authority. Acknowledging that "the Fourteenth Amendment does not create any generalized free-floating right against depriving someone of 'due process' in the abstract," Singleton II, 155 F.3d at 987, the panel majority held that Officer Singleton had a general "occupational liberty"--referred to as "the right 'to engage in any of the common occupations of life'"--that was entitled to substantive due process protection. Id. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The panel majority then held that Officer Singleton had been deprived of his occupational liberty on two different bases: (1) by speculating that if the reason for discharging him became known then it might be difficult for him to secure employment as a police officer elsewhere, and (2) by holding that this occupational liberty conferred upon him the right to retain his particular job with the City of Advance. See id. at 988. Relying on cases such as Kelley v. Johnson, 425 U.S. 238, 248 (1976) and Lowman v. Davies, 704 F.2d 1044, 1046 (8th Cir. 1983), the panel majority also held that "if a government employer's decision or policy is so irrational that it may be branded arbitrary, an employee may plausibly assert that he has been denied his substantive due process rights under the

Fourteenth Amendment." Singleton II, 155 F.3d at 986 (quotations omitted). According to the panel majority, the defendants deprived Officer Singleton of his occupational liberty by discharging him because of Joann's plot, and the notion of substantive due process absolutely barred the defendants from discharging Officer Singleton for this supposedly arbitrary or irrational reason.[4]

At this time, we pause to note that neither Kelley nor Lowman involved an employee's occupational liberty in an at-will employment state, although both were decided under the rubric of substantive due process. Both of these cases dealt with the constitutionality of governmental regulations addressing the appearance--specifically the hair length--of governmental employees and the employees' assertions that these regulations violated "some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance." Kelley, 425 U.S. at 244; see also Lowman, 704 F.2d at 1045 (case involved an employee's alleged "freedom to govern one's personal appearance" (quotations omitted)). The Supreme Court even questioned whether any such liberty was protected by substantive due process, but was willing to assume so for purposes of the appeal. See Kelley, 425 U.S. at 244.[5]

III.

Officer Singleton initially challenges the district court's

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[4]The panel majority also concluded that the defendants' decision to discharge Officer Singleton was arbitrary and irrational. See Singleton II, 155 F.3d at 987.

[5]In the only Eighth Circuit case concluding that a public employee has a substantive due process right to be free from arbitrary and capricious discharge, see Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986), the employee had an undisputed property right in his continued employment. See id. at 326 (employee discharged during term of contractual employment). The Moore panel neither addressed nor considered any claim that an employee's "occupational liberty" would afford a substantive due process right to be free from arbitrary and capricious discharge.

conclusion that the defendants did not violate his substantive due process right of privacy in his marital relationship and his First Amendment right of intimate association. With respect to these challenges, we affirm the district court for the reasons expressed in the first panel opinion. See Singleton I, 133 F.3d at 634-35; see also Singleton II, 155 F.3d at 986.

IV.

We hold that the defendants' alleged arbitrary and capricious firing of Officer Singleton, an at-will employee under Missouri law who could be discharged "for cause or without cause," Dake, 687 S.W.2d at 193, or "for no reason or for an arbitrary or irrational reason," Shawcross, 916 S.W.2d at 343 (quotations omitted), because of the conversation between his wife and daughter did not violate his substantive due process rights. To hold otherwise would be to disregard Supreme Court precedent and the decisions of our sister circuits, which hold that an employee's occupational liberty is not protected by substantive due process when the employee is discharged by a governmental employer. We would also be abusing §1983 to intrude upon and second-guess at-will employment decisions made by state actors, notwithstanding the Supreme Court's admonishment that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies" and "[t]he United States Constitution cannot feasibly be construed to require federal judicial review for every such error." Bishop, 426 U.S. at 349-50 (footnote omitted). Furthermore, we would be distorting the Constitution to supplant Missouri state law and create a federal tort regulating state employment decisions. Cf. Collins, 503 U.S. at 128 (explaining that "state law, rather than the Federal Constitution, generally governs the substance of the employment relationship" and the "Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society" (quotations omitted)).

The Due Process Clause of the Fourteenth Amendment prohibits state governments from depriving "any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1. This clause has two components: the procedural due process and the substantive due process components. See County of Sacramento v. Lewis, 118 S. Ct. 1708, 1713 (1998). "Analysis of either a procedural or substantive due process claim must begin with an examination of the interest allegedly violated," Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 445-46 (8th Cir. 1995), and "[t]he possession of a protected life, liberty, or property interest is . . . a condition precedent" to any due process claim. Movers Warehouse, 71 F.3d at 718; see also Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998)("a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property"). "[W]here no such interest exists, there can be no due process violation." Dobrovolny v. Moore, 126 F.3d 1111, 1113 (8th Cir 1997), cert. denied, 118 S.Ct. 1188 (1998). Merely labeling a governmental action as arbitrary and capricious, in the absence of the deprivation of life, liberty, or property, will not support a substantive due process claim. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) ("the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable" (quotations omitted)); see also Nunez, 147 F.3d at 873 ("There is no general liberty interest in being free from capricious government action."); Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1233 (6th Cir. 1997) (Ryan J., concurring)("merely to state that the Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government'. . . does nothing to state a claim under the substantive component of the Due Process Clause"); Jeffries, 492 F.2d at 4 n.8 (Stevens, J.)(no general liberty interest in being free from arbitrary and capricious governmental action). "Thus, in the absence of a life, liberty, or property interest [Officer Singleton] could be terminated for arbitrary and

capricious reasons." Zorzi v. County of Putnam, 30 F.3d 885, 895 (7th Cir. 1994).

The only question here is whether Officer Singleton has been deprived of a "liberty" protected by substantive due process.[6] The substantive component of "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) (citations omitted).[7] Justice Powell articulated that "substantive due process rights are created only by the Constitution," unlike procedural due process rights which can be created by either state law or the Constitution. Ewing, 474 U.S. at 229 (Powell, J., concurring). For this reason, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 272 (1994).

Officer Singleton suggests that the defendants, by

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[6]There is no dispute that Officer Singleton has not been deprived of either life or property.

[7]An alternative way to bring a substantive due process claim is to assert that the government's actions "either 'shock[] the conscience' or 'offend[] judicial notions of fairness . . .or. . .human dignity.'" Ripley v. St. Louis County, 153 F.3d 627, 631 (8th Cir. 1998) (citations omitted), cert. denied, 119 S. Ct. 1113 (1999). In such a case, the plaintiff's "burden is to establish that the government action complained of is 'truly irrational,' that is, 'something more than . . . arbitrary, capricious, or in violation of state law.'" Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc) (quotations anc citations omitted). Singleton has not, however, sought to prevail under this "shocks the conscience" theory, instead relying solely on the supposed existence and deprivation of his "fundamental" occupational liberty interest. Accordingly, we need not address the applicability of this theory to the facts of the present case.

discharging him from employment, have deprived him of his occupational liberty, which supposedly confers upon him the right to continued employment as a police officer with the City of Advance absent some nonabitrary and rational reason for his discharge. Notably, this is not a situation where the government, as regulator, has somehow used its regulatory authority to deny a person the opportunity to pursue a chosen profession. Compare Roth, 408 U.S. at 575 (noting that "on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university"), with Schware v. Board of Bar Exam'rs, 353 U.S. 232, 246-47 (1957) (government refused to license plaintiff as a lawyer, thus preventing plaintiff from working as a lawyer anywhere in the state). Rather, this case involves a governmental employer's decision to discharge an at-will employee. Thus, we are dealing with the government acting "as [a] proprietor" that was managing "its own internal affairs" rather than as a "lawmaker" that was attempting "to regulate or license . . . an entire trade or profession, or to control an entire branch of private business." Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961). "[I]t is crucial to note the distinction between 'legislative' acts" such as laws and regulations "and 'non-legislative' or 'executive' acts" such as employment terminations when analyzing substantive due process claims. McKinney v. Pate, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994)(en banc).

There is no suggestion that a right to continued employment with a particular governmental employer has "anything resembling 'the individual's freedom of choice with respect to certain basic maters of procreation, marriage, and family life.'" Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979) (per curiam) (citation omitted). To the contrary, the Supreme Court has suggested that a public employee's interest in continued employment with a governmental employer is not so

"fundamental" as to be protected by substantive due process.[8] See id. at 195-99. In Harrah, a school board voted not to renew a tenured teacher's contract because she refused to comply with the board's continuing education requirements. See id. at 195-96. The teacher claimed that she had a liberty interest in not being discharged pursuant to the rule. See id. at 198. While acknowledging that the Due Process Clause "protects substantive aspects of liberty against impermissible governmental restrictions," id. at 197, the Court explained that the teacher's professed liberty interest was completely unrelated to "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." Id. at 198 (quotations omitted). In addition to its conclusion that the board's action was not arbitrary, the Court held that the teacher "neither asserted nor established . . . the deprivation of any fundamental constitutional right." Id. at 199.

Although the Court has not otherwise ruled on the applicability of occupational liberty and substantive due process in the context of a governmental employer's decision to discharge an employee, the Court's procedural due process decisions suggest that Officer Singleton's alleged occupational

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[8]The dissent, quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923), asserts that we are ignoring the Supreme Court's assertion that "liberty includes the right 'to engage in any of the common occupations of life . . .'" Post at 3. The Court recently explained that this liberty right to engage in an occupation extends to a person's ability to engage in a "field of private employment." Conn v. Gabbert, 67 U.S.L.W. 4222, 4224 (U.S. 1999) (No. 97-1802). The Court then made clear that this right has been afforded substantive due process protection only when the government "complete[ly] prohibit[s]," rather than "brief[ly] interrupt[s]," a person from engaging in his desired occupational field. Id. Moreover, the Court emphasized that this "right is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process which all of us may experience from time to time." Id. Here, Officer Singleton, an at-will employee, has been discharged by his governmental employer from one specific job. This is an experience suffered by multitudes of persons, and there is no evidence that Officer Singleton has been stigmatized by his discharge or that he has been completely prohibited from working as a police officer in the future.

liberty is not protected by substantive due process. See Roth, 408 U.S. at 572-75; McElroy, 367 U.S. at 895-96. For example, the Court has explained that "state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." Collins, 503 U.S. at a 128. The Court has also asserted that "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions" and [t]he United States Constitution cannot feasibly be construed to require federal judicial review for every" allegedly erroneous decision. Bishop, 426 U.S. at 350. The Court has further exclaimed that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Id. at 349.

In Roth, a University president informed a non-tenured teacher that he would not be rehired for the next academic year but did not give any reason for the decision. See 408 U.S. at 568. While specifically recognizing that the term "liberty" included "the right . . . to engage in any of the common occupations of life," id. at 572 (quotations omitted), the Court went on to hold that the University's decision did not implicate any liberty interest. See id. at 573. The Court explained that "in declining to re-employ the [teacher], [the University] imposed on him [no] stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id. According to the Court, "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he [is discharged from] one job but remains as free as before to seek another." Id. at 575.

In McElroy, the plaintiff was a cook who worked for a private employer on the premises of a naval base and lost her employment when the naval officer in charge of the base, without giving any reasons, withdrew her security clearance. See 367 U.S. at 887-88. When analyzing her claim, the Court

explained that it "has consistently recognized that . . . the interest of a government employee in retaining his job [] can be summarily denied." Id. at 896. According to the Court, "[i]t has become a settled principle that government employment, in the absence of legislation, can be revoked at . . . will." Id.[9]

If further contrast to any assertion that Officer Singleton's alleged occupational liberty is so fundamental as to be protected by substantive due process, the Supreme Court has steadfastly refused to find a violation of the Due Process Clause when a public employer discharges an employee for no reason, a bad reason, or even a false reason absent the employer's publication of stigmatizing information about the employee in connection with the discharge. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 n.13 (1985) (summarily rejecting the "argu[ment] that [plaintiff] was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head" on the ground that plaintiff's "failure to allege that the reasons for [his] dismissal were published dooms this claim"); Codd v. Velger, 429 U.S. 624, 628 (1979) (per curiam) ("Since the District Court found that [the Plaintiff] had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reason for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his

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[9]Although the Court also "assume[d] that [the plaintiff] could not constitutionally have been excluded from [her job] if the announced grounds for her exclusions had been patently arbitrary or discriminatory," McElroy, 367 U.S. at 898, the Court made this assumption only in the context of an employee's ability to demand a procedural due process hearing. Id. The Court made no suggestion that an employee would be able to rely on "occupational liberty" to assert a substantive due process claim. Cf. McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994) (en banc) ("Supreme Court precedent demonstrates that an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component").

termination is [a procedural] hearing [constitutionally] required." (footnote omitted)); Bishop, 426 U.S. at 348-50 (even if

Based on this Supreme Court case law, several of our sister circuits have refused to allow discharged public employees to proceed with substantive due process claims against their former employers, holding that "employment rights are not 'fundamental' rights created by the Constitution." McKinney, 20 F.3d at 1560; accord Zorzi, 30 F.3d at 895; Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1351 (6th Cir. 1992); see also Lum

F.3d at 895 (citation omitted); see also McKinney, 20 F.3d at 1560 ("Supreme Court precedent demonstrates than an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component."); Roe v. Antle, 964 F. Supp. 1522, 1531-33 (D.N.M. 1997); Reinhart v. City of Maryland Heights, 930 F. Supp. 410, 413 (E.D. Mo. 1996); Rowe v. Board of Educ. of Chattanooga, 938 S.W.2d 351, 353 n.1 (Tenn. 1996).

An at-will public employee's "occupational liberty" should not be utilized as a vehicle for a federal court to interfere with employment decisions under the rubric of substantive due process, especially here, where the discharged employee has no right to procedural due process protection. A contrary conclusion would enable ever discharged at-will public employee who has no heretofore recognized right to procedural due process to assert a constitutional claim and seek redress in federal court.[10] Indeed, if we were to hold that an employee's occupational liberty is afforded substantive due process protection in this case, that liberty should also be afforded procedural due process protection.[11] Public at-will employees would then have the right to a hearing in connection with all discharge decisions so that they may ascertain whether the reasons for discharge were arbitrary or irrational. This directly contradicts, if not outright vitiates, the Supreme Court's repeated assertions that an employee can be discharged for no reason, a bad reason, or a false reason without a hearing, and that an employee has no right to a hearing in the absence of a

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[10]Because every discharge would necessarily constitute the deprivation of an at-will employee's occupational liberty, each such employee could assert a viable substantive due process claim by merely alleging that his discharge was effected for arbitrary or irrational reasons.

[11]If occupational liberty is so fundamental as to be protected by substantive due process in the context of a public employer's discharge decision, that occupational liberty wold also be protected by procedural due process.

property right to his job or unless his employer publicly divulged a stigmatizing reason for the dismissal. This also essentially abrogates the concept of at-will employment. This would also require us to formulate on a case-by-case basis, standards distinguishing bad and false reasons, for which an at-will public employee can be discharged, from arbitrary or irrational reasons.[12] Indeed, "every time a [governmental employee] [was] affected by governmental action, he would have a federal right to judicial review." Nunez, 147 F.3d at 874 (quotations omitted). We would be forced to assume a role that we usually resist--that of a "super-personnel department [] second-guessing the wisdom of . . . personnel decisions," Hill v. St. Louis Univ., 123 F.3d 1114, 1120 (8th Cir. 1997) (quotations omitted), notwithstanding the Court's admonishment that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Bishop, 426 U.S. at 349.

Even if we were to assume that occupational liberty is sufficiently fundamental to qualify for substantive due process protection, we cannot accept the proposition that the defendants deprived Officer Singleton of that liberty. In the context of a governmental employer's decision to discharge an employee, the Supreme Court, in a procedural due process case, has defined the term "occupational liberty" as the "freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573. According to the court, "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he [is discharged from] one job but remains as free as before to seek another." Id. at 575. "This same conclusion applies to the

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[12]The other option would be to allow juries to decide whether an employer's decision to discharge an at-will employee was arbitrary. However, this would further eviscerate the concept of at-will employment by allowing each discharged employee to seek peer review of the decision.

discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." Bishop, 426 U.S. at 348. Indeed, "the right to follow a chosen trade or profession" is not constitutionally deprived when a plaintiff, notwithstanding an adverse employment action, "remain[s] entirely free to obtain employment" or "to get any other job" in his chosen trade. McElroy, 367 U.S. at 895-96.

If has been suggested that the defendants imposed a stigma upon Officer Singleton when they discharged him.[13] Certainly, the mere fact that he was discharged, while it "might make him somewhat less attractive to some other employers[,] would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" Roth, 408 U.S. at 574 n.13. Although the actual reason for Officer Singleton's discharge could possible inhibit Officer Singleton's ability to secure employment in the future as a police officer, this reason was never publicly divulged until the defendants communicated it to Officer Singleton during this lawsuit. Because the "communication was made in the course of a judicial proceeding which did not commence until after [he] had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim." Bishop, 426 U.S. at 348. Moreover, there is no evidence in the record to suggest that the reason for Officer Singleton's discharge has ever been made public outside of these proceedings or that it has impacted his ability to secure other employment.

V.

For the foregoing reason, we AFFIRM the judgment of the

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[13]Officer Singleton has not made this specific contention in connection with his substantive due process claim and the record is bereft of any evidence of stigma. He instead seeks to prevail on the bases that (1) he was discharged and (2) the discharge decision was arbitrary and irrational.

district court.

MORRIS SHEPPARD ARNOLD, Circuit Judge, concurring.

I agree with Judge Richard S. Arnold's admirably lucid statement of the applicable law, which, distilled, is that a person has a constitutional right to be free from government action that is so arbitrary that is shocks the conscience. For me, therefore, the question reduces itself to whether Mr. Singleton's treatment in the circumstances of this case is shocking to the conscience in the constitutional sense. I conclude that it is not.

It would have been an act of considerable disloyalty on Mr. Singleton's part to connive in his wife's scheme, or fail to try to dissuade her from it. It would, moreover, not have been unreasonable to suspect that Mr. Singleton was guilty of one or both of these acts, and I cannot conclude that it would be irrational to take action against someone who was reasonably suspected of disloyalty. I stress the point that the proper inquiry is whether Mr. Singleton's employment could rationally have been terminated, not whether the defendants could have proved that he was in fact disloyal. If a reasonable suspicion motivates an act, the act cannot be irrational; and it is not unreasonable to suppose that a man or a women knows what his or her spouse it up to. In fact, the Supreme Court has pointed out that a governmental act similar to the one complained of here was reasonable because it "precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent" party. *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926).

Since terminating Mr. Singleton 's employment was not objectively irrational, it passes constitutional muster. Suppose, though, that the defendants fired Mr. Singleton, not because they suspected him of collusion on some level, but simply because of what his wife did; and suppose that I am wrong in

assuming that the constitutional inquiry is an objective one, that is, one that does not focus on the defendants' actual subjective motive. I would still not find that the defendants acted illegally. For one thing, firing Mr. Singleton for his wife's acts rationally serves the legitimate purpose of ensuring that officers conscientiously monitor and police their spouses' actions. It is rational, moreover, to fire Mr. Singleton in order to punish his wife and discourage further unwanted behavior on her part. Finally, it is rational to terminate Mr. Singleton's employment as a kind of retribution against his wife, even if it did not discourage further unwanted conduct. Retribution may be out of favor, but it is hardly irrational . Indeed, whole societies have organized their legal systems around the idea.

One or perhaps all of these motivations may strike many as mean-spirited or even immoral. Since they are not irrational, however, they are not unconstitutional, and the present case can serve, as Mr. Justice Thomas put it in a similar case, as "a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." *See Bennie v. Michigan*, 516 U.S. 442, 454 (1996) (concurring opinion.

I therefore concur in the judgment of the court.

RICHARD S. ARNOLD, Circuit Judge, with whom McMILLIAN and WOLLMAN, Circuit Judges, join, dissenting.

Officer Singleton did not have a fixed term of employment. He was an at-will employee. When he was fired, the city did not, until after litigation had commenced, give any reason for its action. Accordingly, Mr. Singleton had neither a "property interest" nor a "liberty interest" as those phrases have come to be understood in due-process jurisprudence. He has no procedural-due-process claim. He is not entitled to any kind of a hearing with respect to his discharge. The Court today holds that Mr. Singleton therefore, and automatically, has no

substantive-due-process claim, no matter what reason the city had or gave for firing him. He could be fired for what his wife and daughter said to each other. He could be fired because his name starts with an "S." He could be fired because of the color of his hair. In none of these instances would the Due Process Clause of the Fourteenth Amendment pose any obstacle.

In my view, this holding is based on fundamental misunderstanding of the Due Process Clause as it has been interpreted for over a century by the Supreme Court. I therefore respectfully dissent. I have already attempted, at some length, to explain my reasoning, see Singleton v. Cecil, 155 F.3d 983 (8th Cir. 1998) (opinion for the panel); Singleton v. Cecil, 133 F.3d 631, 635 (8th Cir. 1998) (opinion dissenting from the first panel decision), and will try not to repeat myself here.

The Due Process Clause declares that no state shall deprive any person of life, liberty, or property without due process of law. The words sound entirely procedural and could well have been interpreted that way, but that has not been the course of the law. The Supreme Court has traditionally recognized two kinds of due-process claims, substantive and procedural. Procedural-due-process claims are what they sound like-claims that a plaintiff has been deprived of something without the proper procedure. The claim is not that the plaintiff has a right to keep the thing in question at all events, but rather that the state cannot deprive him of it without some sort of hearing, either before or after the deprivation. The "property interest" and "liberty interest" concepts were developed in this context, and they make sense. In the case of the employment relationship, a "property interest" arises out of a contract that provides that I have a right to keep my job for a certain period of time, at least in the absence of misconduct or other specified circumstances. The "liberty interest" concepts refers to the interest in my own reputation, and embodies the right not to be stigmatized at the time of discharge unless some sort of fair

procedure establishes that the stigma is appropriate.

Substantive due process, on the other hand, has nothing to do with procedures, hearings, contracts of employment for fixed periods, stigmatizing reasons for dismissal, or any other particularized kind of governmental conduct. The concept is much more general. As the Supreme Court has recently explained, a substantive-due-process violation takes place when governmental power is exercised arbitrarily and oppressively. City of Sacramento v. Lewis, 118 S. Ct. 1708, 1716 (1998). "[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised . . ." Ibid. The Court's opinion in Lewis cites cases all the way back to 1819 to support this interpretation of the meaning of due process. See, e.g., Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819): due process is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." The concept is a general one. It is not susceptible of detailed formulation. It cuts across all limiting categories. The core of the idea is not that government can deprive me of the thing in question only if it follows certain procedures, but rather that government cannot, for the reason given, deprive me of the thing in question at all. "Substantive due process" is certainly controversial, historically and academically, but the idea is firmly fixed in our jurisprudence.

The doctrine, to be sure, is not wholly disembodied from the words of the Fourteenth Amendment (or the Fifth, as the case may be). There is no free-floating right to due process. There is a right, instead, not to be deprived, without whatever process is due, of "life, liberty, or property." Life and property are not at issue here. Liberty is. The Court's position is that an at-will employee who is not discharged for a stigmatizing reason simply has no due-process claim, however arbitrary, egregious, or oppressive the conduct of his employer may have been.

The Supreme Court's cases are wholly at odds with this conclusion. "Liberty," as that term is used for substantive-due-process purposes, has never been a tightly controlled analytical concept. As the Court said in Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954), "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." More particularly, liberty includes the right "to engage in any of the common occupations of life. . ." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Supreme Court's employment cases make this clear. Cafeteria & Restaurant Worker Union v. McElroy 367 U.S. 886 (1961), is a good example. The plaintiff was a short-order cook who lost her job when her security clearance was withdrawn. She was not deprived of anything beyond that particular job, but all nine members of the Court were nevertheless agreed she was protected, in the substantive sense, from conduct that was patently arbitrary. Id. at 898. The case was mainly about procedural due process, and the plaintiff lost her case, but not because the Court thought she had not been deprived of "liberty." Rather, in the Court's view, plaintiff had received all the process that was due. The reason given for her discharge, the withdrawal of a security clearance, was certainly not arbitrary, and, under all the circumstances, the Court felt that no hearing or other special procedure was necessary.

Another good example is Harrah Independent School District v. Martin, 440 U.S. (1979) (per curiam). This Court today cites Harrah as authority for its own position, see ante at 11, but, and I say this respectfully, the Court is simply wrong. Harrah was a case brought by a public-school teacher. She had been discharged for failure to comply with certain continuing-education requirements. She alleged that the application of these requirements to her was arbitrary and capricious, in the constitutional sense. The Supreme Court disagreed, explaining that the reasons given were not at all arbitrary. Plaintiff asserted both procedural and substantive theories under the Due

Process Clause. Because she was a tenured teacher, and could be dismissed only for specified reasons, she was entitled to a hearing to determine whether any such reasons existed, and she had received that hearing. Her procedural claim was therefore rejected. Her substantive-due-process claim was then treated separately and also rejected, on the ground that the policy being applied to her was not irrational. The fact that the plaintiff had "tenure," or a fixed contract of employment, was not mentioned at all in the course of the substantive-due-process analysis. Instead, the Court confronted and squarely decided the question whether the discharge had been arbitrary or irrational.

If there is any doubt as to my reading of Harrah, it should be dispelled by Judge Bowman's opinion in Moore v. Warwick Public School District No. 29, 794 F.2d 322 (8th Cir. 1986). Moore was also a case brought by an employee of a school district. He alleged two things: first, that because he had a one-year contract of employment, he was entitled to some sort of pre-termination process; and second, as a substantive-due-process claim, that he had been discharged for arbitrary and capricious reasons. We held that the latter theory stated a claim under the substantive aspects of the Due Process Clause. Harrah, we thought, was controlling on the point. When the Supreme Court formulated a rational-basis standard and reached the merits of Harrah's claim, we said, "the Court necessarily recognized a substantive due process right to be free from arbitrary and capricious state action in this particular context." 794 F.2d at 329. Nothing in our discussion of the substantive-due-process claim indicated that it turned on the fact that plaintiff had a property interest in his job. The fact was simply irrelevant.

The Court is concerned, and with good reason, about the breadth of this concept. If substantive due process is interpreted without a high degree of discretion and restraint, it will in due course engulf the whole world of the law. For this reason, both

the Supreme Court and this Court have emphasized the necessity of great judicial restraint. In order to violate the Due Process Clause, governmental action must be more than merely "arbitrary" in some general or logical sense, more than merely "arbitrary and capricious" in the commonly accepted administrative-law sense of that phrase. The action must be "arbitrary in the constitutional sense." Collins v. Harker Heights, 503 U.S. 115, 129 (1992) (emphasis supplied). "[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. . . . [T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" County of Sacramento, supra, 118 S. Ct. at 1717, quoting Collins, supra, 503 U.S. at 128.

This Court has made the same point several times. In the zoning context, for example, we have distinguished between what might be called ordinary administrative-law allegations that a certain governmental action is arbitrary and capricious, and decisions that are truly irrational;

> [S]ubstantive-due-process claims should be limited to "truly irrational" governmental actions. An example would be attempting to apply a zoning ordinance only to persons whose name begin with a letter in the first half of the alphabet.

Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992), quoting Lemke v. Cass County, Nebraska, 846 F.2d 469, 472 (8th Cir. 1987) (en banc) (Richard S. Arnold, J., concurring, in an opinion joined by half of the ten-member en banc Court). The solution to what might be called substantive-due-process sprawl is not to close the door of the courthouse entirely. It is, instead, to be very careful about the

circumstances in which the door is opened.

In an attempt, perhaps, to soften the blow, today's opinion for the Court en banc tries to draw a distinction between what it sees as two kinds of substantive due process: the existence of a " 'fundamental' occupational liberty interest," the theory which, the Courts says, plaintiff advances in this case, on the one hand, and the claim that governmental action shocks the conscience or offends judicial notions of fairness or human dignity, or, to use another formulation, is truly irrational, on the other hand. Ante, at 10 n.7. If these are true distinctions, the law appears to be choking on its own verbal formulations. But, in fact, they are not. They are only ways of restating the same thing, using slightly different legal formulations. As the Supreme Court observed in County of Sacramento, in a passage already quoted, an action which is arbitrary, in the constitutional sense, and which, therefore, violates the Due Process Clause, is something that shocks the judicial conscience. Arbitrariness and conscience-shocking are not two different things. The Court implies that if Mr. Singleton had alleged that his discharged shocked the judicial conscience, or was truly irrational, he might have a case, despite the absence of a property or liberty interest. If this is a real distinction, it can truly be said that the en banc mountain has labored and brought forth a mouse. In fact, neither the plaintiff nor any of the previous opinions taking his side in this case have used the term "fundamental occupational liberty interest," nor would it have mattered if they had. All of these formulations are admittedly imprecise (because there is no way of being precise about the subject) ways of saying the same thing: governmental action which inflicts upon the citizen any grievous wrong is unconstitutional under the Due Process Clause of the Fourteenth Amendment if it is utterly lacking in rational basis or fundamentally unfair for some other reason.

At no time does to Court today defend the reason given by

the city for Mr. Singleton's discharge. It simply rejects his suit because his job does not fit either the "property interest" or "liberty interest" categories, concepts which, as I have tried to show, make sense only with respect to procedural-due-process claims. "[T]he concepts of liberty and property interests are . . . useful solely in the context of procedural due process." Meis v. Gunter, 906 F.2d 364, 369 (8th Cir. 1990).

I respectfully dissent.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1726EM

David C. Singleton,	*	
	*	
Appellant,	*	
v.	*	On Appeal from the
	*	United States District
Don Cecil, Individually and in his	*	Court for the Eastern
official capacity as Chief of Police;	*	District of Missouri.
Harley Moyer, Ivan Parker, Kevin	*	
Tidwell, Della Price, Individually	*	
and in their official capacities as	*	
Aldermen; and the City of Advance,	*	
Missouri,	*	
Appellees.	*	

Submitted: November 18, 1997
Resubmitted: March 6, 1998
Filed: September 15, 1998

Before RICHARD S. ARNOLD,[1] Chief Judge, McMILLIAN and MAGILL, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

David Singleton appeals the District Court's entry of summary judgment in favor of the City of Advance, Chief of Police Don Cecil, and four Advance City Council members, on

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[1]The Hon. Richard S. Arnold stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998. He has been succeeded by the Hon. Pasco M. Bowman II.

his claim under 42 U.S.C. §1983 (1994) that his termination as an Advance police officer violated his rights to free speech, association, privacy, and due process. After briefing and oral argument, we affirmed the judgment, one judge dissenting. See Singleton v. Cecil, 133 F.3d 631, 636 (8th Cir. 1998). We then granted Mr. Singleton's petition for rehearing, thus vacating the original panel opinion and judgment. We have now reconsidered the case. We hold that dismissal of a public employee on the sole basis of a conversation between his wife and daughter is wholly arbitrary, and violates the Due Process Clause of the Fourteenth Amendment.

In 1990, David Singleton and his wife Joann moved to Advance, Missouri, and David took a job as a police officer with the City of Advance. At the time David Singleton worked for the City of Advance, Don Cecil was the Chief of Police, and Harley Moyer, Ivan Parker, Kevin Tidwell, and Della Price were the four members of Advance's City Council. William T. Bradshaw served as Advance's Mayor in 1993 and 1994. The Singletons' daughter, Sabrina Scaggs, also lived in Advance at this time.

Joann Singleton frequently talked with Sabrina on the phone in the mornings, and Sabrina often spoke to her mother on a cordless phone. On the morning of March 8, 1994, a local private investigator named David George was scanning radio frequencies with a radio scanner and happened to pick up a conversation between Joann and Sabrina. In this conversation, Joann said that she could "set up" Chief of Police Don Cecil by hiring someone to bribe him. George recorded the conversation between Sabrina and Joann.

Later that day, David George contacted Chief of Police Cecil and Mayor Bradshaw and played the recording of the conversation for them. George also provided Cecil with a copy of the recording. Cecil then visited the homes of each of the

City Council members and played the recording for them. The Council members recognized the voices on the recording as belonging to Joann Singleton and Sabrina Scaggs. On March 11, Mayor Bradshaw called a special meeting of the City Council to discuss the recording. The Council members were upset (as well they should have been) that David Singleton's wife and his daughter had discussed attempting to bribe Cecil, and Cecil recommended that the City Council terminate Singleton as an Advance police officer. City Attorney Donald Rhodes advised the City Council that as an at-will employee, Singleton could be discharged without cause and without a hearing. All four members of the Council then voted in favor of terminating Singleton. Under Missouri law, this vote was sufficient to terminate Singleton's employment with the City. See Mo. Ann. Stat. §79.240 (1998). Each City Council member later submitted an affidavit stating, "My decision to terminate [David Singleton] was based upon the statements in the conversations on the tape recording about setting up Chief of Police Cecil by having someone try to bribe him, and nothing else." Appellees' App. at 135, 140, 145, 150. Singleton was informed that he was discharged in a letter dated March 11, 1994, the day of the Council meeting.

David Singleton filed this suit against Chief Cecil, the four City Council members, and the City of Advance. Singleton alleged under 42 U.S.C. §1983 that his termination by the defendants violated his rights of free speech and association, due process, and privacy. He also claimed that he was terminated in retaliation for his knowledge of some of Chief Cecil's allegedly illegal activities. The District Court granted summary judgment in favor of the defendants on all Singleton's claims. Specifically, the District Court held that Singleton's retaliatory-discharge claimed failed because he could not demonstrate any causal connection between the purported protected activity and the termination. Singleton v. Cecil, 955 F. Supp. 1164, 1166-67 (E.D. Mo. 1997). The Court also held

that any claim of a denial of procedural due process failed because, as an at-will employee, Singleton had no liberty or property interest in his job. Id. at 1167. Finally, the District Court held that Singleton's claim that his rights of intimate association and marital privacy were denied also failed, because "the defendants had a legitimate, good faith belief that plaintiff, with his family, was engaging in improper conduct by conspiring to bribe the Chief of Police." Id.

We agree with most of the reasoning of the original panel opinion, which affirmed the District Court's rejection of Singleton's arguments that the actions of the Advance City Council and Chief Cecil infringed on his rights to intimate association and marital privacy. See Singleton v. Cecil, 133 F.3d at 634-35. However, Singleton raised another argument on appeal, not explicitly addressed in the first panel opinion. Singleton argued that he was discharged solely because of statements made by his wife, and that dismissal for this reason was arbitrary, capricious, and violative of his substantive-due-process rights. See Appellant's Br. at 14-15, which makes this argument quite clearly:

> Under these circumstance [sic] it is clear that the sole motivation for discharging David Singleton was the fact that his wife had made a statement which angered and "upset" the Council members. . . That is precisely the kind of arbitrary and capricious logic that fails to pass even the most relaxed scrutiny of under [sic] substantive due process.

We agree with this argument and, accordingly, we now reverse the judgment of the District Court and remand for further proceedings.

The Fourteenth Amendment prevents state governments from depriving "any person of life, liberty, or property, without

due process of law. . ." The Due Process Clause has long been held to prevent irrational or arbitrary actions by government officials. See County of Sacramento v. Lewis, 118 S. Ct. 1708, 1716-17 (1998); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Chesterfield Development Corp. v. City of Chesterfield, 936 F.2d 1102, 1104 (8th Cir. 1992) ("[S]ubstantive-due-process claims should be limited to 'truly irrational' governmental actions. An example would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet.") The constitutional guarantee against arbitrary state action is part of the Due Process Clause's "substantive sphere," as opposed to its guarantee of fair procedures. County of Sacramento, 118 S. Ct. at 1713. In cases involving the termination of government employees, federal courts are not to review every error in "the multitude of personnel decisions that are made daily by public agencies." Bishop v. Wood, 426 U.S. 341, 349 (1976) (footnote omitted). However, if a government employer's decision or policy is "so irrational that it may be branded 'arbitrary,' " an employee may plausibly assert that he has been denied his substantive due process rights under the Fourteenth Amendment. Kelley v. Johnson, 425 U.S. 238, 248 (1976) (citation omitted). See Lowman v. Davies, 704 F.2d 1044, 1046 (8th Cir. 1983).

This is one of those rare cases in which, on the basis of the facts in the record now before us, a government employee can plausibly argue that he has been denied substantive due process because his employer's actions in terminating him were irrational and arbitrary. The evidence in this case establishes that David Singleton was terminated because of the conversation between Joann Singleton, his wife, and Sabrina Scaggs, his daughter, about bribing Chief of Police Don Cecil. In affidavits, each City Council member who voted to discharge Singleton stated that he or she decided to terminate Singleton on the basis of David George's taped recordings, "and nothing

else." Appellees' App. at 135, 140, 145, 150. As the defendants noted in their motion for summary judgment, all the evidence in this case "establishes that [Singleton] was terminated solely for the statements made in the taped conversation." Appellees' App. at 73. In granting summary judgment in favor of the defendants, the District Court said that "uncontradicted evidence" showed that the defendants had a "legitimate, good faith belief" that Singleton was improperly conspiring to bribe Cecil. 955 F. Supp. at 1167. Evidence to that effect would make a big difference in this case, but the City Council members never testified to any such legitimate, good-faith belief, and we can find no evidence to that effect in the record. Therefore, it seems that the City Council terminated Singleton simply because of the conversation between his wife and daughter.

In this country, guilt is individual. We do not, as a general rule, punish A for the sins of B. Nor does the law today generally impute the actions of one spouse to another, or the actions of an adult child to the parent. See Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 501-02 (8th Cir. 1996) ("We do not think any general inference can be drawn from the opinion of one spouse to that of the other."), rev'd on other grounds, 118 S. Ct. 1633 (1998). At common law, a husband was held responsible for any crimes committed by his wife in his presence, because the law presumed that the wife was coerced or controlled by her husband. See Haning v. United States, 59 F.2d 942, 943 (8th Cir. 1932). Modern courts have rejected this presumption. Id. See United States v. Dege, 364 U.S. 51, 53 (1960) (opining that this common-law rule "implies a view of American womanhood offensive to the ethos of our society"). At common law, a husband was also responsible for his wife's torts. Modern courts have rejected the idea that spouses are liable for one another's torts without proof that both spouses are involved in the tortious misconduct. See Petersen v. Heflin, 163 Mich. App. 402, 408, 413 N.W.2d 810, 812

(1987) (holding that a wife is not liable, simply by virtue of the marital relationship, for her husband's negligent acts); Dodson v. Anderson, 710 S.W.2d 510, 512 (Tenn. 1986) (holding that a wife is not liable, simple by virtue of the marital relationship, for her husband's fraudulent acts). And courts have held that a parent is not responsible for a child's torts by virtue of the parental relationship alone. See Nat'l Dairy Prod. Corp. v. Freschi, 393 S.W.2d 48, 53 (Mo. App. 1965); Lane v. Chatham, 251 N.C. 400, 401, 111 S.E.2d 598, 600 (1959). As we noted above, there is no evidence in this case that David Singleton was involved with the plot to bribe Chief of Police Cecil. Given the absence of proof of this crucial fact, and given the modern view that the marital and parental relationships alone may not be used to impute liability for misconduct, we hold that it is irrational and arbitrary to presume that someone is involved with a conspiracy, merely because he is related to the conspirators.

We also hold that the City officials' arbitrary conduct deprived Singleton of his liberty, as that term is used in the Due Process Clause of the Fourteenth Amendment. We readily acknowledge that the Fourteenth Amendment does not create any generalized free-floating right against depriving someone of "due process" in the abstract. The Amendment itself states: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process law. . ." It is sometimes said that persons claiming a violation of this Clause must show that they have been "deprived of due process," but this shorthand statement, though perhaps acceptable in colloquial speech, is manifestly inaccurate. What one has to be deprived of is either life, liberty, or property. Otherwise, it does not matter whether one has received due process or not. In the present case, Mr. Singleton does not claim that the City of Advance, Missouri, has taken either his life or his property. He was an at-will employee of the City and therefore had no property right in his job as a police officer. Therefore, in order to establish a claim,

plaintiff has to show that he has been deprived to "liberty" as that term is used in the Fourteenth Amendment.

This "liberty" has long been understood to include the right "to engage in any of the common occupations of life . . .." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citing cases). "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest by . . . action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." Id. at 399-400. More recent cases are in accord. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Court, speaking through Mr. Justice Black, hardly a fan of "substantive due process," had this to say:

> A State cannot exclude a person from the practice of law for from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment . . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards . . ."

Id. at 238-39. The point is underscored in a footnote:

> We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.

Id. at 239 n.5.

In the present case, the reason ultimately given by the

defendants for discharging Mr. Singleton - that his wife and daughter were conspiring to bribe the Chief of Police - would doubtless, if it became known, make it very difficult, if not impossible, for him to secure employment as a police officer with any other city. A new employer would probably think, contrary to the facts so far established in this case, that the City of Advance had some good reason to believe that Mr. Singleton was involved in the plot. But even if the only consequence were the loss of this particular job, a due-process claim would still be stated under the authoritative precedents of the Supreme Court. In Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), the plaintiff was a short-order cook at a cafeteria operated by a private employer on the premises of a naval base. She lost her employment when the naval officer in charge of the base, without giving reasons, withdrew her security clearance. The employee ultimately lost her case, but not on account of any notion that she had not been deprived of "liberty" when she lost her job. The Court stressed that the plaintiff had lost nothing beyond the opportunity to work in a particular military installation, but it held, nonetheless, that "'constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.'" Id. at 897, quoting Weiman v. Updegraff, 344 U.S. 183, 192 (1952). The court went on to draw a distinction between substantive and procedural due-process rights:

> We may assume that Rachel Brauner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory-that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational. . . .

Id at 898.[2]

It is suggested that because Mr. Singleton had no property right in the job, and because no stigmatizing reason was given for his dismissal at the time it occurred, that he has no "liberty interest" and therefore no right to due process. Buhr v. Buffalo Public School District No. 38, 509 F.2d 1196 (8th Cir. 1974), is cited in support of this proposition, and we concede that the citation is apt. In that case, Delores Buhr, a fifth-grade teacher at a public school in North Dakota, claimed, among other things, that the school board had discharged her arbitrarily. She alleged violations of both substantive and procedural due process, under the Fourteenth Amendment. The school board had found that Ms. Buhr, a nontenured teacher, had caused emotional and nervous stress on the part of some students (a reason that, on its face, is not arbitrary). Ms. Buhr asserted that this finding was without support. In rejecting this claim, a panel of this Court held that the plaintiff had not been deprived of "liberty" as that term is used in the Fourteenth Amendment. In the absence of a property interest in the job, or a stigmatizing reason for dismissal, announced at the time of the employment account itself, our panel said, no right to substantive due process arises.

Ordinarily, we would be bound by Buhr. One panel of this Court may not overrule a holding of another panel. The Buhr Court itself, however, acknowledged that within this Circuit "substantive due process claims have spawned two distinct views," one of which "seems to suggest that substantive due process is . . . violated whenever a state acts to the detriment of an individual in a manner that is arbitrary or capricious." Id. at

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[2]McElroy was a 5-to-4 opinion. But on the point that is relevant for present purposes, the Court was unanimous. The dissenting opinion refers unequivocally to "the substantive right-not to be arbitrarily injured by Government-which the Court purports to recognize." Id. at 900 (Brennan, J., dissenting).

1201 (footnote omitted). The Buhr opinion goes on to cite, id, at 1201 nn.4, 5, cases of this Circuit on both sides of the question. The Buhr panel selected the line of cases holding that there is no right against arbitrary discharge. We do not think this obligates our panel to make the same choice. Buhr was not an en banc opinion. When there are two lines of authority, a panel is free to select the one it believes to be correct. We choose the older, more traditional line, exemplified by the Supreme Court cases cited in this opinion. The concept of substantive due process is certainly open to question. Indeed, the Buhr Court, id. at 1201, appeared to believe that substantive due process was a thing of the past. The Supreme Court, however, believes otherwise, and we are bound by its pronouncements. We do not hesitate to affirm that the concept of substantive due process should be carefully limited and applied with great restraint. This is not at all the same thing, however, as saying that the doctrine no longer exists. It clearly does.

We concede that Mr. Singleton has no "liberty interest" as that term is used in procedural-due-process cases. He had no constitutional right to a hearing in connection with his discharge. Indeed, a hearing would have no purpose. We know the reason for the discharge, and Mr. Singleton does not deny that the conversation between his wife and daughter took place. If the City had taken the position that Mr. Singleton was a co-conspirator with his wife and daughter, a hearing might have been held on that point, but the members of the City Council have never made any such assertion. The concept of "liberty interest," as it has grown up in procedural due process cases, beginning with Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), simply has no application to the present situation. What matters is not whether there is a "liberty interest" for purposes of procedural due process in cases of a discharge for stigmatizing reasons, but rather the right to work

at a lawful occupation is part of the "liberty" protected by the Fourteenth Amendment. As this Court expressly stated in Meis v. Gunter, 906 F.2d 364, 368 (8th Cir. 1990), "[t]he terms liberty interest and property interest are used in the context of procedural-due-process claims." "[T]he concepts of liberty and property interests, are, as we have noted, useful solely in the context of procedural due process." Id. at 369 (emphasis supplied). Accord, Bagley v. Rogerson, 5 F.3d 325, 328-39 (8th Cir. 1993).

This case is perhaps a good illustration of the reasons why words used in judicial opinions, or in legal discourse generally, should not invariably be taken to have the same meaning, whatever the context. Certainly it is true that no due-process violation, whether procedural or substantive, can occur unless someone has been deprived of life, liberty, or property – in the present case, liberty. It does not follow that the sort of "liberty"– commonly called "liberty interest" – required as the basis for a procedural-due-process claim must also be shown by someone attempting to assert a substantive claim under the Due Process Clause. The term "liberty" must be given a sensible construction, one sensitive to the context in which it is being used. When one has a property interest in a job, for example, a right not to be discharged except for good cause, or when one has been discharged for a stigmatizing reason, it makes good sense to hold that some sort of hearing is necessary, in order to determine either whether good cause for the discharge exists, or whether the stigmatizing reason is a true one. But when someone, even an at-will employee, is discharged for what later turns out to be a totally arbitrary reason, one completely at odds with any notion of common sense, whether the employee in question had tenure, or was stigmatized at the time of his dismissal, has nothing to do with the case. Otherwise, a governmental unit could fire an at-will employee because his name starts with"A," or because it rained last night. We are unwilling to accept any such interpretation of the Constitution.

Accordingly, the order of the District Court, granting defendants' motion for summary judgment, is reversed, and this cause is remanded for further proceedings not inconsistent with this opinion.

MAGILL, Circuit Judge, dissenting.

I respectfully dissent. First, the majority's resolution of this appeal turns on an issue that Singleton never raised: whether the reasons given for his discharge were so arbitrary and irrational as to infringe upon his liberty interest in "engag[ing] in any of the common occupations of life . . . ." Ante at 7. "The first step in substantive due process analysis is to identify the constitutional right at stake." Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). In this case, the only constitutional rights identified by Singleton throughout the course of these proceedings are the right of intimate association and marriage. See, e.g., Appellant's Br. at 12 ("Plaintiffs' [sic] claim . . . rests on the right of intimate family association and the fundamental right of privacy in matters of marriage and marital life which are part of a basic right of privacy and an intrinsic element of personal liberty protected by the Due Process Clause of the Fourteenth Amendment."); id. at v ("[t]he action below was brought . . . to redress the . . .invasion of his fundamental liberty interest in marriage and family association"). Singleton has never suggested that his discharge violated some more general liberty interest relating to employment. Because "[o]ur review is limited to issues specifically raised and argued in the [appellant's] brief," White v. Moulder, 30 F.3d 80, 82 (8th Cir. 1994), we should limit ourselves to addressing only those particularized rights upon which he has chosen to pursue his case.

Second, the majority's resolution of this appeal does not square with the clear precedent of this court: "to the extent our cases recognize a constitutional right to substantive due process,

that right is no greater than the right to procedural due process." Weimer v. Amen, 870 F.2d 1400, 1405-06 (8th Cir. 1989) (citing Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1202 (8th Cir. 1974)); see also Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335, 1340-42 (10th Cir. 1976) (following Buhr, recognizing it specifically held that "a constitutional right to substantive due process . . . is no greater than the right to procedural due process" (quotations omitted)). The majority concedes that Singleton has identified no property right, see ante at 7, and no liberty interest to support a procedural due process claim. See id. at 10. Under Buhr, Singleton's substantive due process claim thus must be dismissed. The majority suggests that the Buhr court "acknowledged that within this Circuit 'substantive due process claims have spawned two distinct views,'" and that it merely "selected the line of cases holding that there is no right against arbitrary discharge." Id. (citations omitted). Contrary to the majority's assertion, the Buhr court specifically explained that rather than selecting one line of cases in favor of the other, its opinion "reconciled" the various lines of cases. See Buhr, 509 F.2d at 1202. Accordingly, Buhr is the law of this Circuit with respect to Singleton's substantive due process claim.

Third, the substantive due process claim as articulated by the majority leads to a dubious result: at-will employment will now be unconstitutional in the public sector in the Eighth Circuit. The majority uses the concept of substantive due process to preclude a public employer from discharging an at-will employee for an arbitrary or irrational reason. However, the Supreme Court has consistently held that a public employer may discharge an at-will employee for no reason, or even a bad reason, without running afoul of the Due Process Clause. See Codd v. Velger, 429 U.S. 624, 628 (1977) ("[s]ince the District Court found that (the plaintiff) had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents

no federal constitutional question (footnote omitted)), Bishop v. Wood, 426 U.S. 341, 348-50 (1976) (if employer's reason for discharging employee were false, employee still could not state due process claim).

The majority opinion broadens Singleton's liberty interest in "engag[ing] in any of the common occupations of life," ante at 7 (quotations omitted), to hold that he has a liberty interest in continuing employment as a police officer with the City of Advance absent some nonarbitrary and rational reason to discharge him. This cannot be squared with either the concept of at-will employment or with existing precedent. Indeed, by crafting a right to be free from arbitrary government termination, the majority reaches the anomalous conclusion that "the same element--'freedom from arbitrariness'--should at once entitle a person to due process and also be a part of the process which is due." Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 4 n.8 (7th Cir. 1974) (Judge Stevens). Moreover, the majority ignores that Singleton was merely discharged from one job--that of policeman--and Singleton has not suggested that he cannot achieve any other employment with the City of Advance or any other city. See Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895-96 (1961) (holding that where plaintiff "remained entirely free to obtain employment" either with her employment or another employer, her liberty right in "follow[ing] a chosen trade or profession" was not implicated).

At worst, the City's decision to discharge Singleton was made on the mistaken belief that Singleton was aware of and possibly involved in his wife and daughter's plan to bribe the chief of police. However, the Supreme Court has specifically explained that

> [w]e must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day

> administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action . . . can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop, 426 U.S. at 349-50 (emphasis added). In the case, it is clear that the City of Advance's motivation in discharging Singleton was not any desire to curtail or penalize the exercise of his constitutionally protected rights.

Moreover, in Board of Regents v. Roth 408 U.S. 564 (1972),[3] the Court explained that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." Id. at 575. "This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." Bishop, 426 U.S. at 348. Reasons given in private to Singleton or while participating in this litigation do no constitute the requisite public disclosure. See id. Singleton bears the burden of demonstrating that "the defendants, in connection with discharging him, publicly made untrue charges against him that would stigmatize him so as to seriously damage his standing and associations in the

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[3]I disagree with the majority's suggestion that Roth and other employment-related "liberty interest" cases are inapplicable to the present situation. Certainly, they are relevant in determining the constitutional rights a public at-will employee has in his continued employment.

community, or foreclose his freedom to take advantage of other employment opportunities." Waddell v. Forney, 108 F.3d 889, 895 (8th Cir. 1997). In this case, no reason was given for the City of Advance's decision to dismiss Singleton until the city council members provided affidavits during litigation. See Appellees' App. at 135, 140, 145, 150, 242. Accordingly, Singleton's discharge was not in violation of any substantive due process.

Despite the Supreme Court's pronouncement that "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions," Bishop, 426 U.S. at 350, the majority's holding permits a discharged at-will public employee to characterize a wrongful discharge claim as a substantive due process claim, and thus bring suit in federal court. Indeed, any at-will public employee disgruntled over a poor job evaluation or a reprimand may bring a substantive due process claim in this court to the extent that the employer's action threatens that employee's now-constitutional right to work. This court must now, on a case-by-case basis, reconcile the fact that a public employer may constitutionally discharge an at-will employee for no reason or a false reason, while that same employer cannot discharge that same employee for an arbitrary and irrational reason. Where will the line be drawn between a false reason for which an employee cannot seek constitutional redress and an arbitrary and irrational reason? This decision forces this court to function in a role which it has heretofore strenuously resisted--that of a "super-personnel department[] second-guessing the wisdom of . . . personnel decisions." Hill v. St. Louis Univ., 123 F.3d 1114, 1120 (8th Cir. 1997) (quotations omitted). By recognizing a right to be free from arbitrary government action, the majority in essence holds that "every time a citizen [is] affected by governmental action, he [will] have a federal right to judicial review." Jeffries, 492 F.2d at 4 n.8. The separation-of-powers doctrine requires this court to exercise greater self-restraint; "[t]he

federal judiciary is not a good-government watchdog," Nunez v. City of Los Angeles, 147 F.3d 867, 874 (9th Cir. 1998), and "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Bishop, 426 U.S. at 349. Setting aside allegedly "arbitrary" and "irrational" discharges is simply beyond the purview of the federal judiciary.

In sum, even if the City of Advance terminated Singleton for an arbitrary reason, the termination failed to impair a liberty interest or a property interest, and thus cannot be cognizable in a substantive due process claim.

United States Court of Appeals
For the Eighth Circuit

No. 97-1726

David C. Singleton, Appellant,	*	
	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
Don Cecil, Individually and in official capacity as Chief of Police; Harley Moyer; Ivan Parker; KevinTidwell; Della Price; City of Advance, Appellees.	*	

Submitted: November 18, 1997
Filed: January 8, 1998

Before RICHARD S. ARNOLD, Chief Judge, and MCMILLIAN and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

After the City of Advance, terminated the employment of police officer David Singleton, Singleton sued the City of Advance's police chief and members of its city council under 42 U.S.C. § 1983 (1994). Singleton initially claimed that he was terminated in retaliation for his knowledge of the police chief's allegedly improper purchase of an automobile. After discovery revealed that Singleton was discharged because his

wife and daughter had plotted to frame the police chief, Singleton amended his complaint to claim that his termination infringed on his rights of free speech, association, privacy, and due process. The district court[1] granted summary judgment to the defendants on all claims. Singleton appeals only the grant of summary judgment on his claims that the termination infringed on his fundamental right of privacy in the marital relationship and on his right to intimate familial association. We affirm.

I.

The City of Advance, Missouri, employed plaintiff David Singleton as a police officer from 1990 until his termination in March 1994. During the period relevant to this appeal, defendant Don Cecil served as the City of Advance's police chief. Defendants Harley Moyer, Ivan Parker, Kevin Tidwell, and Della Price were elected members of the City of Advance's city council. William Bradshaw, the mayor of Advance during this period, was not a named defendant. The City of Advance did not have a written employment agreement with Singleton. Under Missouri law, Singleton's employment was terminable at will, either by the mayor with approval of a simple majority of the city council, or by a two-thirds vote of the city council. See Mo. Ann. Stat. § 79.240 (West 1987); State ex rel. Lupo v. City of Wentzville, 886 S.W.2d 727, 730-31 (Mo. Ct. App. 1994).

On the morning of March 8, 1994, Joann Singleton, the plaintiff's wife, called Sabrina Scaggs, the plaintiff's daughter, on a cordless telephone. Their conversation turned to the subject of Police Chief Cecil, who, in David Singleton's view,

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[1]The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

had purchased for his own benefit a red 1994 Ford Crown Victoria under and incentive program designed only for government purchases.[2] At one point in the conversation, Joann Singleton remarked that she wanted to "set up" Cecil by hiring someone to bribe him. Scaggs Dep. at 57 reprinted in Appellees' App. at 237. Unfortunately for the Singletons, this statement was recorded by private investigator David George. Throughout March 1994, George monitored cordless phone channels in the City of Advance with his radio scanner, "[m]ore or less" for entertainment purposes. George Dep. at 37, reprinted in Appellees' App. at 228. George played the tape for Police Chief Cecil and the mayor and later gave Cecil a copy of the tape.

Over the next few days, Police Chief Cecil played the tape for the city council members individually. Each recognized the voices on the tape as Joann Singleton and Sabrina Scaggs. At a special meeting on March 11, 1994, the city council unanimously voted to terminate Singleton's employment as a police officer, based on the recording of Joann Singleton plotting to frame Police Chief Cecil. See Tidwell Aff. at 3-4, reprinted in Appellees' App. at 134-35; Moyer Aff. at 3-4, reprinted in Appellees' App. at 139-40; Parker Aff. at 3-4, reprinted in Appellees' App. at 144-45; Price Aff. at 3-4, reprinted in Appellees' App. at 149-50. Singleton received a discharge letter dated March 11, 1994, which did not state a

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[2]Mayor Bradshaw and the city council members had prior knowledge of Police Chief Cecil's purchase and considered the car available for use by the city as a backup police vehicle. See Bradshaw Dep. at 30, reprinted in Appellees' App. at 90; Tidwell Aff. at 1-2, reprinted in Appellees' App. at 132-33; Moyer Aff. at 1, reprinted in Appellees' App. at 137; Price Aff. at 1, reprinted in Appellees' App. at 147. Despite David Singleton's belief that Police Chief Cecil had engaged in illegal activity, Singleton never notified any law enforcement officials, the mayor, or the city council of his concerns.

reason for his termination.

Singleton then sued Police Chief Cecil and the city council. Singleton's initial complaint alleged wrongful discharge and a violation of procedural due process. Singleton later amended this complaint to allege that the City of Advance violated his First Amendment, due process, and privacy rights by terminating him in retaliation for his knowledge of Police Chief Cecil's automobile purchase. During discovery, Singleton learned that the defendants' sole reason for their action was the recording of Joann Singleton plotting to bribe the chief of police. On November 11, 1996, Singleton again amended his complaint to include the additional claims that the dismissal based on his wife's statement violated Singleton's rights of free speech, intimate association, privacy, and due process.

Based solely on the second complaint,[3] the defendants moved for summary judgment. Singleton did not respond to this motion. The district court ruled on all of the claims in the third amended complaint and granted summary judgment for the defendants. The district court concluded that Singleton could not show retaliatory discharge because insufficient evidence connected Singleton's allegedly protected conduct (the intended whistle-blowing) and his termination. The district court also held that, as an employee at will under Missouri law, Singleton did not have a liberty or property interest in his employment sufficient to implicate procedural due process rights. Finally, the district court held that the defendants did not violate Singleton's privacy or associational rights and noted that the defendants "had a legitimate, good faith belief the

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[3]Due to an oversight on behalf of Singleton's counsel, the third amended complaint was never properly served on the defendants.

plaintiff, with his family, was engaging in improper conduct by conspiring to bribe the Chief of Police." Mem. and Order (Feb. 20, 1997) at 8, reprinted in Appellant's App. at 95.

Singleton appeals only the district court's determination that the city did not violate his substantive due process right of privacy in his marital relationship and his First Amendment right of intimate association.

II.

We review the district court's grant of summary judgment de novo. Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997). Summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to Singleton, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As the material facts in this case are undisputed, we are left solely to determine whether the City of Advance is entitled to judgment as a matter of law.

Singleton acknowledges that his employment as a police officer was terminable at the will of the City of Advance. Advance could thus terminate Singleton for any reason or no reason at all. See Cooper v. City of Creve Coeur, 556 S.W.2d 717, 721 (Mo. Ct. App. 1977) ("The determination of the adequacy of the grounds for [an employee at will's] discharge is not subject to judicial review because the city could discharge him for no reason or for any reason."). Our inquiry is therefore limited to whether the City of Advance's termination of Singleton infringed on his constitutional rights. See Frazier v. Curators of the Univ. of Mo., 495 F.2d 1149, 1153 (8th Cir. 1974) (nontenured public employee may be terminated "provided the dismissal is not in fact based upon some constitutionally impermissible ground, such as . . . retaliation

for assertion of rights guaranteed by law or the Constitution").

Singleton claims that his termination violated his substantive due process right of privacy in his marital relationship.[4] The fundamental right of privacy embodies the "principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government." Planned Parenthood v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Supreme Court has recognized "that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process clause." Zablocki v. Redhail, 434 U.S. 374, 384 (1977). This right, however, does not invalidate every state action that has some impact on marriage. See Gorrie v. Bowen, 809 F.2d 508, 522-23 (8th Cir. 1987) ("Not every regulation that involves or somehow regulates on the basis of family membership is unconstitutional."). Rather, the government is free to impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship . . . ." Zablocki, 434 U.S. at 386. Government action "must interfere 'directly and substantially' with family choices before it is unconstitutional, " Gorrie, 809 F. 2d at 523 (quoting Zablocki, 434 U.S. at 387) (citation omitted), but action having only a collateral effect on family

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[4]The only disputed privacy right in this case is located in the substantive component of the Fourteenth Amendment's due process clause. This case does not concern the privacy of communications over cordless telephones, which are not constitutionally protected. See Tyler v. Berodt, 877 F.2d 705, 706-07 (8th Cir. 1989) (per curiam) (no justifiable expectation of privacy in oral communication over cordless telephone). Subsequently, communications over cordless telephones have received statutory protection. See Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202, 18 Stat. 4279, 4290-91 (enacted Oct. 25, 1994) (amending 18 U.S.C. §§ 2510-11).

decisions typically does not violate that right. Compare Zablocki, 434 U.S. at 388-91 (striking down statute that prohibited individuals from marrying until compliance with preexisting child support obligations proven) with Califano v. Jobst, 434 U.S. 47, 52-54 (1977) (upholding statute that terminated Social Security benefits of dependent children on marriage to individuals not entitled to benefits).

In this case, the City of Advance did not directly or substantially interfere with Singleton's right to be married when they terminated him on the basis of his wife's recorded statement threatening to frame the police chief. Singleton presented no evidence that his termination "significantly discouraged, let alone made 'practically impossible,'" his marriage to Joann Singleton. Zablocki, 434 U.S. at 387 n.12. Nor is there evidence that the City of Advance acted with the goal of poisoning Singleton's marriage. Cf. Morfin v. Albuquerque Pub. Sch., 906 F.2d 1434, 1440 (10th Cir. 1990) ("A defendant can be held liable for violating a right of intimate association only if the plaintiff shows an intent to interfere with the relationship."). As the scope of substantive due process rights should be viewed narrowly, see Washington v. Glucksberg, 117 S. Ct. 2258, 2267-68 (1997) (extending substantive due process rights, "to a great extent, place[s] the matter outside the arena of public debate and legislative action"), we do not expand the right of marriage to protect Singleton here.

Singleton also alleges that the City of Advance infringed on his intimate association right. As a component of the First Amendment right of association, the right of intimate association guards against excessive government intervention into "the formation and preservation of certain kinds of highly

personal relationships . . . ." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). The right to marry has thus been cast as a substantive due process right, see Loving v. Virginia, 388 U.S. 1, 12 (1967), and as an associational right, see Roberts, 468 U.S. at 619. The nominal source of this right, however, does not alter this Court's analysis of the challenged government action. See Lyng v. International Union, United Auto., Aerospace, & Agric. Implement of Workers of Am., 485 U.S. 360, 365-66 (1988) (applying direct and substantial interference standard to First Amendment right of family association); Montgomery v. Carr, 101 F.3d 1117, 1124 (6th Cir. 1996) ("[T]he level of security to be applied to state action impinging on the right to marry is invariant with respect to the precise constitutional provision undergirding that right."). In both instances, the government remains free to act in a fashion that does not directly and substantially interfere with the right to marry. Singleton's assertion of an intimate associational right must fail for the same reasons as does his assertion of a fundamental right of privacy. The City of Advance's termination of Singleton on the basis of his wife's conduct simply did not substantially or directly interfere with Singleton's right to enter and maintain his marital relationship.

Accordingly, we affirm the district court's grant of summary judgment in favor of the defendants.

RICHARD S. ARNOLD, Chief Judge, dissenting.

I can agree that plaintiff has failed to establish a violation of those aspects of the Due Process Clause of the Fourteenth Amendment that have been particularized as the rights of intimate association a marital privacy. But Mr. Singleton makes an additional argument that the Court's opinion fails to

address. He claims (and the City admits) that he was fired solely because of what his wife said to his daughter on the telephone. He argues that this "is precisely the kind of arbitrary and capricious logic that fails to pass even the most relaxed scrutiny . . . under substantive due process." Brief for Appellant 15. The Due Process Clause stands as a protection against all purely arbitrary governmental action - for example, a rule against hiring anyone whose name begins with "A." In my view, it is this more general aspect of substantive due process that provides plaintiff with a winning argument.

In our legal tradition, fault is individual. A is not punished for what B does, let alone for what B says. Is the situation when A and B are married? At common law, it was. If a wife committed a crime in the presence of her husband, she was presumed to have acted at his direction, and he was held responsible. Presumably any such rule would be constitutionally condemned today under the Due Process Clause. Is what happened here any more defensible? I think not. In a related context, we have held that a husband's political opinion cannot be automatically attributed to his wife. Forbes v. Arkansas Educational Television Comm'n, 93 F.3d 497, 501-02 (8th Cir. 1996) ("We do not think any general inference can be drawn from the opinion of one spouse to that of the other."), cert. granted on other grounds, 117 S. Ct. 1243 (1997).

The District Court's opinion, quoted ante at 4, says that the City had "a legitimate, good faith belief that plaintiff, with his family was . . . conspiring to bribe the Chief of Police." This would doubtless make the case quite different. A city is entitled to have police officers in its employ who are not conspiring to bribe the Chief. A reasonable belief that an officer is conniving

at such conduct would certainly be a rational, non-arbitrary basis for discharge. But what is the evidence for this statement (aside from the bare fact of the marital relationship)? The District Court cited none, this Court cites none, and I know of none.

I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

DAVID C. SINGLETON,	)	
Plaintiff,	)	
v.	)	Case No. 1:94CV71 CDP
DON CECIL, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motion for summary judgment. Plaintiff has not responded to the motion for summary judgment, and his time for doing so has expired. On the undisputed record produced here, it is clear that defendants are entitled to judgment as a matter of law, and the Court will therefore grant defendants' motion.

Plaintiff, a former police officer for the City of Advance, Missouri, brings his third amended complaint[1] in two counts, both claiming relief under 42 U.S.C. §1983. In Count I plaintiff alleges that he was terminated from his employment as a City of Advance police officer "to silence [him] and discredit him to avoid the likelihood of public disclosure" of an allegedly fraudulent car purchase by the Chief of Police, defendant Don Cecil. He alleges that his termination "violated his rights of freedom of speech, of association and to acquire information, his / right to due process of law, and the right of privacy . . ."

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[1]The Court notes that defendants' motion for summary judgment refers to plaintiff's second amended complaint. The Court will interpret the motion as being directed to plaintiff's third amended complaint, which was filed on November 15, 1996.

In Count II plaintiff alleges that he was terminated because of statements his wife and daughter made to each other in a tape-recorded telephone call, and he alleges that the termination violated his "protected rights of freedom of speech and association, right to privacy, and right to due process of law."

I. Undisputed Facts

Plaintiff David Singleton was employed by the City of Advance as a police officer from 1990 until his termination in March of 1994. At the times relevant to this suit defendant Don Cecil was the city's Chief of Police, and defendants Harley Moyer, Ivan Parker, Kevin Tidwell, and Della Price were elected members of the City council. William Bradshaw, not named as a defendant, was the Mayor of Advance during the relevant time period.

On March 8, 1994, David George, a private investigator, was scanning radio frequencies with his radio scanner. While scanning channels to listen to conversations on cordless telephones, an activity that George considers to be "entertainment," George listened to a conversation between plaintiff's wife, Joann Singleton, and plaintiff's daughter, Sabrina Scaggs. During the conversation, plaintiff's wife made a statement indicating that she was going to "set up" Chief Cecil by hiring someone to bribe him. George decided to tape this conversation, and later that day he played the tape for Mayor Bradshaw and Chief Cecil. He gave a copy of the tape to Cecil.

Between March 9 and March 10, 1994, Cecil visited the members of the city council individually and played the tape for each member; all realized that the tape was of a conversation

between plaintiff's wife and daughter. None of the council members discussed the tape with Mayor Bradshaw before he called a special meeting on March 11, 1994. At the special meeting, the council discussed plaintiff and the tape. Chief Cecil recommended that plaintiff be terminated. After consulting the city attorney regarding legal options available to them for dealing with the situation, all four members of the city council voted in favor of terminating plaintiff's employment as a police officer.

Several months before these events, both the City and the police chief had purchased automobiles through a Ford incentive program. The city council and mayor knew that Chief Cecil intended to purchase a vehicle individually through the incentive program, and believed there was nothing improper in his doing so. In early March 1994, Bradshaw received an anonymous letter concerning Cecil's purchase of the second automobile. The letter, which was signed "a concerned citizen," claimed that Cecil had illegally purchased the vehicle for his personal use. It is now undisputed that plaintiff's daughter sent the letter, although this was not known at the time of plaintiff's termination. Bradshaw showed the letter to Cecil and the city council members, but because Bradshaw did not feel that there were any irregularities in Cecil's purchase of the vehicle, he took no further action in the matter.

The city council did not discuss the letter at the March 11 meeting, and in fact never collectively discussed the letter or any alleged illegal activity involving Cecil and the car purchase. Moreover, neither Cecil nor the city council members knew of plaintiff's perception that Cecil had engaged in illegal or fraudulent activity regarding the automobile purchase or that plaintiff's daughter wrote the letter. Plaintiff received a letter

confirming his termination on March 11, the same day as the meeting, and the letter provided no reasons for why plaintiff was terminated.

Plaintiff admits that he was unaware of the reason for his termination by the city on March 11, 1994, although he stated in his deposition that he assumed it was to "keep him quiet" about Cecil's alleged illegal activities. Plaintiff conceded in his deposition that he has no factual support for this assumption, other than the fact that he was not provided with a reason for his termination.

II. Discussion

In determining whether summary judgment should issue pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the facts, and the inferences from these facts, are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish the absence of a genuine issue of material fact and to show that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Once the moving party has met this burden, however, the non-moving party may not rest on the allegations in its pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). If the non-moving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant is unable to make a showing sufficient to establish the existence of an element essential to its case. Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990).

Plaintiff brings this action pursuant to 42 U.S.C. § 1983, and he alleges that his discharge by the city violated his First Amendment rights, the due process clause of the Fourteenth Amendment, and his constitutional right to privacy. Although plaintiff's third amended complaint is far from a model of clarity, the gravamen of the constitutional claims is that plaintiff was discharged either because he intended to blow the whistle on Cecil's automobile purchase or because of his wife and daughter's conversation.

Plaintiff alleges that defendants terminated him in order to "keep him quiet" about Cecil's allegedly illegal activities, and that they therefore violated his rights to freedom of speech, association, and privacy. This claim sounds in retaliatory discharge. In deciding a claim of First Amendment retaliatory discharge, a court looks to (1) whether the employee's speech involves a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, (3) whether the government would have made the same employment decision in the absence of the protected conduct. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979) (quoting Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)); see also Shands v. City of Kennett, 993 F.2d 1337, 1342-43 (8th Cir. 1993), cert. denied, 510 U.S. 1072 (1994); Smith v. Cleburne County Hosp., 870 F.2d 1375, 1381-82 (8th Cir.), cert. denied, 493 U.S. 847 (1989).

The Court need not decide whether plaintiff can show the first two elements, because the undisputed facts fail to show anything causally linking plaintiff's termination to his alleged protected expression. The undisputed evidence shows that defendants terminated plaintiff because they believed he and his

family were conspiring to "set up" the police chief, and for no other reason. Plaintiff therefore cannot show any connection between the allegedly protected conduct (the planned whistle-blowing regarding the car) and his termination. Plaintiff concedes in his deposition that he merely "assumed" that he was terminated because defendants wanted him to "keep him quiet" about his knowledge of Cecil's allegedly illegal actions. The only reason plaintiff had for assuming that he was retaliated against was that he was not provided with a reason for his termination. However, defendants' uncontradicted evidence establishes that the issue raised by the conversation between plaintiff's wife and daughter was the sole factor involved in his termination by the city, and that Cecil, Bradshaw, and the City Council members were unaware of plaintiff's allegations of illegal conduct on the part of Cecil when they unanimously voted to terminate him on March 11, 1994. Because there is no evidence showing a causal connection between plaintiff's purported protected activity and his termination, his claim of retaliatory discharge must fail. See Mt. Healthy, 429 U.S. at 287.

To the extent plaintiff is attempting to allege that he was deprived of procedural due process, that claim must also fail. According to Mo. Ann. Stat §79.240 (Vernon 1987), appointive officers of fourth-class cities such as Advance are terminable at will by the mayor acting with the consent of a majority of the aldermen or by two-thirds of the aldermen acting independently of the mayor. Because the Missouri courts have consistently referred to police officers as "appointive officers," plaintiff did not have a liberty or property interest in his employment that implicated procedural due process. See Armer v. City of Salem, 861 F.2d 514, 515-16 (8th Cir. 1988); State ex rel. Lupo v. City of Wentzville, 886 S.W.2d 727, 730-31 (Mo. Ct. App.1994).

Last, to the extent that plaintiff is alleging that his right to privacy or association was violated because the conversations of plaintiff's wife and daughter were recorded, the uncontroverted evidence establishes that the conversations were taped by George, who was not employed by the city and was not acting at the direction of anyone. Therefore, plaintiff's claim must fail. See Tyler v. Berodt. 877 F.2d 705, 706-07 (8th Cir. 1989), cert. denied, 493 U.S. 1022 (1990) (holding that individuals could not maintain action against private citizens and law enforcement officers who intercepted individuals' cordless telephone conversations, as users of cordless telephone did not have justifiable expectation of privacy for their conversations); State v. King, 873 S.W.2d 905, 909 (Mo. Ct. App. 1994); see also Madewell v. Roberts, 909 F.2d 1203, 1208 (8th Cir.1990) (holding that liability under §1983 requires a causal link to and direct responsibility for, the deprivation of rights). The uncontradicted evidence shows that the defendants had a legitimate, good faith belief that plaintiff, with his family, was engaging in improper conduct by conspiring to bribe the Chief of Police. Terminating him for this reason did not violate his constitutional rights.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment [#18] is granted.

IT IS FURTHER ORDERED that defendants' motion for enlargement of time to file pretrial materials is denied as moot. A separate judgment in accordance with this Memorandum and Order is entered this same date.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated the 20th day of February, 1997.